FILE COPY

FILED
NOV 8 1933
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 394

JOHN S. FUNK, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

CHAS. A. HAMMER,
Harrisonburg, Va.;
ALLEN ADAMS,
Greensboro, N. C.;
JOHN W. CARTER, JR.,
Danville, Va.;
Counsel for Petitioner.

INDEX.

Subject Index.

Brief for appellant:	Page
Opinion of court below	1
Jurisdiction	1
Statement of the case	2
Specification of errors	2
Argument	3
Summary of argument	3
Point A	3
Proposition 1	5
Proposition 2	8
Proposition 3	15
Conclusion	21

Table of Cases Cited.

Benson v. U. S., 146 U. S. 325	16
Dowdy and Funk v. U. S., 46 Fed. (2d) 417	12
Funk v. U. S., 66 Fed. (2d) 70	1
Greer v. U. S., 245 U. S. 559	15
Jin Fuey Moy v. U. S., 254 U. S. 189	3
Rosen v. U. S., 245 U. S. 467	3, 12
U. S. v. Reid, 12 How. 361	3

Statutes Cited.

Acts of Congress, March 16, 1878 (20 Stat. at L. 30; Title 28, U. S. C. A., Par. 632)	18
Rev. Stat. 858	18
Rev. Stat. 5392; Comp. Stat. 1916, 10,295	19
35 Stat. at L. 1088, Chap. 321; Comp. Stat. 1916	19
Code of Virginia, Sec. 2	10

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 394

JOHN S. FUNK, PETITIONER AND APPELLANT BELOW,

vs.

THE UNITED STATES OF AMERICA, RESPONDENT AND APPELLEE BELOW.

BRIEF FOR PETITIONER.

I.

Opinion of Court Below.

The opinion on appeal in the United States Circuit Court of Appeals for the Fourth Circuit is reported in 66 Fed. (2d) 70.

II.

Jurisdiction.

A statement of the grounds on which the jurisdiction of this Court is invoked has been set forth in the brief in support of petition for writ of certiorari (pages 7-9). It is therefore not here repeated.

III.

Statement of the Case.

The appellant, John S. Funk, was convicted in the District Court of the United States for the Middle District of North Carolina on a charge of conspiracy to violate the National Prohibition Act (R. 1, 45, 54).

The government's case was largely dependent upon the evidence of one Charlie Martin, who was an admitted co-conspirator, and who was not indicted because used as a government witness (R. 2, 7-16). During the course of his evidence, Martin testified to a number of acts and statements of the appellant in the presence of the wife of the appellant, and also to telephone conversations between Martin and the wife of the appellant, all of which were highly incriminating (R. 10, 12, 15, 16). At the close of the government's case, the appellant offered his wife as a witness in his behalf. Upon objection by the government, she was not permitted to testify, nor was she permitted to state for the record what her testimony would be (R. 29).

Upon conviction the appellant was sentenced to imprisonment in the Federal Penitentiary at Atlanta, Georgia, for one year and one day (R. 54, 64). An appeal from said judgment was taken by the appellant to the United States Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment of the District Court (R. 70).

IV.

Specification of Errors.

The District Court erred in sustaining the objection of the government to the competency of the appellant's wife as a witness in his behalf, and the Circuit Court of Appeals erred in not reversing the judgment for this reason.

V.

ARGUMENT.

Summary of Argument.

POINT A. The wife of a defendant charged with crime in the federal courts is a competent witness for her husband. This Court, by its order of October 16, 1933, has limited the argument in this case "to the question as to what law is applicable to the determination of the competency of the wife of the petitioner as a witness." (R. 71).

Point A.

In the brief in support of petition for writ of certiorari, an effort was made to trace the judicial history of the pronouncement of this Court in the case of *Jin Fuey Moy* v. *United States* (December 6, 1920) 254 U. S. 189, 65 L. Ed. 214, 41 S. C. R. 98, which pronouncement has been taken by many of the Circuit Courts of Appeals as a definite holding that the wife of a defendant in a criminal trial in the courts of the United States is not competent as a witness on behalf of her husband. We sought to attack the soundness of such a rule; to demonstrate that it had been the subject of severe criticism by at least some of the inferior federal courts, and to show that these inferior courts manifested a state of perplexity and confusion because of the patent inconsistency between the decision in the *Jin Fuey Moy* case, *supra,* and the case of *Rosen* v. *United States* (1918) 245 U. S. 467, 62 L. Ed. 406, 38 S. C. R. 148. We further attempted to show that for more than 40 years this Court and the inferior federal courts have been obviously seeking to avoid the full force and effect of the decision in *United States* v. *Reid* (1851) 12 How. 361, 13 L. Ed. 1023, and have been ingenious in finding reasons to except par-

ticular cases from the operation of the rule first announced in that case. We pointed out that the rule of the *Reid* case had been definitely abandoned by this Court in the decision of the *Rosen* case, *supra*, and that apparently without the aid of legislation by Congress.

It may be that the argument advanced in that brief may properly be termed destructive criticism, rather than constructive suggestion. We, of course, desire that the Court shall read our brief in support of the petition as an argument on the merits of the question involved. However, in this brief we shall attempt to advance our idea of what the law should be, rather than a criticism of the decided cases. In other words, we shall attempt to answer the Court's query contained in the order allowing certiorari, to-wit, "What law is applicable to the determination of the competency of the wife of the petitioner as a witness?" (R. 71).

The only argument that can be advanced in favor of the doctrine that a wife is incompetent to testify for her husband in criminal trials in the federal courts must have as its foundation the reasoning and the logic of the *Reid* case.

The *Reid* case undertook to construe the purpose and intent of Congress, as expressed in the Judiciary Act of 1789. We shall advance three propositions, and if we are correct in any one of the three, the wife of the appellant Funk was a competent witness in his behalf in the present case.

These propositions are as follows:

(1) The *Reid* case was wrongly decided. The court did not properly interpret the Congressional intent.

(2) Conceding that the *Reid* case was properly decided, and that the court did correctly state the purpose of Congress as expressed in the first Judiciary Act, the effect and

meaning of that decision has been misconstrued by both bench and bar.

(3) Assuming that we are entirely wrong in our Propositions 1 and 2, Congress has, by subsequent legislation, manifested a purpose and intent to make the wife a competent witness for her husband in criminal trials, in the light of cases decided by this Court, construing other Acts of Congress, and in accordance with the most conservative conception of *stare decisis*.

Proposition No. 1.—We appreciate fully the very radical position taken in the statement of this proposition. We are apprehensive that the Court may feel that we are bold to the point of rashness in suggesting that the decision in the *Reid* case, which has been the accepted law for eighty-two years, shall be lightly brushed aside. Nevertheless, we seriously contend that a careful re-examination of that case might well convince the Court that the construction placed on the Judiciary Act of 1789 in the opinion of Mr. Chief Justice Taney was erroneous.

We again direct attention to the fact that Congress did not prescribe "in express words the rule by which the courts of the United States are to be governed in the admission of testimony in criminal cases." We point out that this Court found it necessary to look beyond the express language and the direct terms of the Judiciary Act in order to ascertain the Congressional intent. Neither the Judiciary Act of 1789 or the Crimes Act of 1790 made any "express provision concerning the mode of conducting the trial after the jury are sworn," nor do either of them "prescribe any rule by which it is to be conducted, nor the testimony by which the guilt or innocence of the party is to be determined." Please remember that these are not our conclusions, but the statements made by this Court in the *Reid*

case. The court then concluded that it was obvious "that some certain and established rule upon this subject was necessary to enable the courts to administer the criminal jurisprudence of the United States," and that it was "equally obvious that it must have been the intention of Congress to refer them (the courts) to some known and established rule." This conclusion of the court is not based upon anything that Congress said in the Judiciary Act or the Crimes Act. It is an inference drawn by the court. It is a construction of the statute admittedly by implication. Indeed, the court says, "This is necessarily to be implied from what these Acts of Congress omit, as well as from what they contain."

Because of a conclusion reached by such a method, the court holds that "the rules of evidence in criminal cases are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed." May we say, with all deference, that we are not so sure of the correctness of this construction of the statute, and of this statement of the Congressional purpose.

The personnel of the first Congress was remarkably high in intellectual standards and attainments. A number of them had served in the Continental Congresses and in the Constitutional Convention of 1787. As a rule they were thoroughly familiar with the English system of government and jurisprudence. They were versed in the history, the tradition, and the learning of the common law, as one of the most precious heritages that the American States had received at the hands of their English forebears. They knew that the law of procedure in the English courts, and in the courts of the newly formed American States had been almost entirely the product of the judiciary, rather than the legislative, branch of the government. They knew that the rules of evidence, administered by the courts, both

in England and America, bore scarcely a trace of legislative action and influence. The judges of England and America, from time immemorial, had formulated, announced, enforced, improved, modified, and adapted these rules to changing conditions and to progressive action and thought, with little, if any, aid by way of legislative action.

The members of the first Congress knew that the codification of a set of rules of evidence by a legislative body was highly impractical; that the determination of such a set of rules was peculiarly a function that could be best exercised by the courts who lived with these rules from day to day and applied them in the ordinary practice of the courts in performing their functions as the agency of the government by which justice was administered.

Why is it necessary for us to assume that Congress did not intend to give the federal courts a free hand in this respect, when we know that the courts of the respective States and the courts of the mother country had had such a free hand since the early dawn of English liberty? Why must we assume, not because of anything that Congress said, but because of what Congress did not say, and by some manner of implication, that Congress intended to depart from the policy that had been theretofore pursued by all of the English-speaking legislative bodies?

Moreover, if it was the purpose of Congress to make this radical departure from historical legislative precedent, it seems to us inconceivable that it did not see the necessity of saying so in plain, positive, and direct language that would have left nothing to the realm of construction. The mere fact that Congress did not venture into this field seems to us conclusive that it intended to make the federal courts responsible for the rules of evidence controlling in those courts.

We therefore seriously and earnestly contend that the construction of the Judiciary Act of 1789 which we have

here advanced is more logical, more reasonable, and more likely a correct statement of the Congressional intent, than that which is found as the announced doctrine of the *Reid* case. It certainly has the virtue that it is in accord with the experience of the past among the English-speaking people, and that it is not dependent upon speculation or implication, nor does it require that language be read into the Act of 1789 which cannot, in fact, be found there.

Proposition No. 2.—We realize fully that the rule of *stare decisis* tends to "consistency and uniformity of decision," and that this Court will be very slow to accept our viewpoint as expressed in Proposition No. 1, because to do so would, of course, make it necessary to overrule the line of cases beginning with the *Reid* case and coming down through the years since that time. We therefore, in this branch of our discussion, accept the decision in the *Reid* case as sound and as the law of the land. We deem it proper to point out, however, what we conceive the *Reid* case to actually say, as against what we believe to be the popular conception among bench and bar as to its holding. Carelessly stated, the profession generally seem to take it that the *Reid* case holds that the rules of evidence in criminal cases are the rules which were in force in the respective States when the Judiciary Act of 1789 was passed, and *that these rules continue in effect until and unless Congress shall change or modify them by appropriate legislation.*

At least it is our view that this is the conception of the *Reid* case decision, particularly as it applies to the competency of a wife as a witness for her husband. We do not think that the courts have been so strict in their construction of the decision as it applies to other rules of evidence, and this we shall attempt to point out.

As we see it, the popular conception of the *Reid* case as we have stated it, is entirely erroneous. The final conclusion of the court is stated as follows:

> "But the rules of evidence in criminal cases, are the rules which were in force in the respective States when the Judiciary Act of 1789 was passed. Congress may certainly change it whenever they think proper, within the limits prescribed by the Constitution. But no law of a State made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases; and the testimony of Clements was therefore properly rejected, and furnishes no ground for a new trial" (Page 366).

Analyzing this conclusion, here is what we understand the court to say:

(1) The rules of evidence as of 1789 are the rules for the federal courts;

(2) Congress may change these rules when it thinks proper;

(3) No state action since 1789 can have the effect of changing the rules.

As we see it, the finding is (*a*) to establish the rules; (*b*) to state the elementary principle that the legislative branch of the government may, if it chooses to do so, exercise its superior will to change the rule; (*c*) to state a necessary proposition to the effect that the legislative action of entirely different sovereignties from that of the federal government cannot be permitted to control or to influence its prosecutions.

There is no language expressly forbidding the federal courts from changing or modifying the rules, as changed conditions might require. There was nothing new in the Court's statement to the effect that Congress might change

the rules of evidence. The legislative bodies in the respective states and in England had always had such a power and, upon rare occasions, had exercised it.

This was no new principle of either government or law, and we insist that its restatement here was not intended to tie the hands of the federal courts and prevent the orderly, logical, and natural evolution and development of the law of evidence by the same process that had been responsible for those rules as they then existed.

In other words, the *Reid* case did not mean to hold, in any event, that Congress intended by the Act of 1789 to adopt the common law rules of evidence as a statute. The *Reid* case did not intend to hold that by virtue of this Congressional action, these rules were to become rigid and static, not susceptible to growth or change except by the stimulus of legislative action. It is inconceivable that Congress could have presented the federal courts with rules of evidence that were alive and growing, and in the same breath determined that henceforth life and growth must end. This is inconceivable as the purpose of Congress, and the *Reid* case does not hold that Congress had any such purpose.

Section 2 of the Code of Virginia is as follows:

> "The common law of England, so far as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except in those respects wherein it is or shall be altered by the General Assembly."

Similar provisions are found in constitutions of many of the states, particularly in the older states. And yet we have never heard it contended that because a state has adopted the common law of England, that by reason of that fact, the courts must go back and try to determine

what that common law was 150 or 250 years ago, and cannot depart from the principles of common law as it then existed, except by legislative aid.

The modifications of the common law since the fourth year of the reign of James I (1607), which is the date that the common law of England became effective in the Commonwealth of Virginia, have been innumerable, and the courts have not been too scrupulous to ascertain whether the changes and modifications which they have announced have had the sanction of legislative action. The same is true in practically every state in the Union.

If the decision in the *Reid* case is sound, as we are now conceding, it could have meant no more than the constitutional provision to which we have referred, and other like provisions in constitutions of other states. And yet we daresay that no one has ever contended that such provisions have been intended to crystallize and harden the elastic, adaptable principles of the common law into the form and shape of a statute as unchangeable as the law of the Medes and Persians, except by will of some legislative body. Such could not have been the purpose of Congress in enacting the Judiciary Act of 1789, and such was not the decision of the *Reid* case.

If the common law rules as they existed in 1789 were adopted by Congress, as the *Reid* case apparently holds, then both Congress and the Court expected those rules to be modified and changed by the courts as the occasion might require in the discretion of the courts, except and when Congress chose to exercise its superior will and forbid such practice in some respect.

And this has been the practice in the federal courts when it dealt with questions of competency of witnesses and admissibility of evidence that are not related to the question of husband and wife. For some strange reason, the strict

conception of the *Reid* decision that we have stated seems to be applied only where it is sought to have a wife testify for her husband or a husband for his wife.

In the brief in support of the petition, we discussed at great length the case of *Rosen* vs. *United States, supra.* There can be no question that this Court has absolutely departed from the common law rule of 1789 insofar as that rule affected the competency as witnesses of persons convicted of infamous crime. And there can be no question but what, almost without exception, the inferior federal courts and the commentators take it that that action of this Court was brought about by judicial construction, and not by legislative aid.

We do not care to multiply cases of this character, but we cannot refrain from pointing out a striking instance of where one of the federal courts, while careful to apply the strict rule of 1789 as against the wife as a witness for her husband, felt entirely free to relax it in a rather important respect. The case we refer to is that of *Dowdy and Funk* v. *United States* (C. C. A. 4th Ct., Jan. 13, 1931), 46 Federal (2d) 417. It happens to be the first trial of the present case in the Circuit Court of Appeals. In the trial court, Funk had offered his wife as a witness in his behalf. The court ruled that she was not competent. Upon appeal the Circuit Court of Appeals promptly, and with very little discussion, held that the ruling was correct; that the wife was not competent in the federal courts, and that this court had so held. It was not deterred from this ruling by consideration of the *Rosen* case, *supra* (Pages 420 and 421). Of course every authority that it cited went back to the old rule of 1789 as the reason for such a holding.

In the very same opinion another question of the law of evidence was presented on this appeal. The government witness Martin (admittedly a co-conspirator) had made

certain statements to a Special Inspector of the Prohibition Bureau. The statements were made after the alleged conspiracy had concluded and were not in furtherance thereof. "These statements were nothing more than a confession by Martin, implicating Funk" (Page 425). Nevertheless, the trial court permitted the inspector to testify as to what was said to him by Martin on this occasion, upon the theory that this evidence corroborated Martin's direct testimony.

Now it is quite true, as was pointed out by the court, that the general rule prevailing throughout the United States is that such evidence is inadmissible. Permit us, however, to point out that the court, in its opinion, said:

> "The counsel for the government, however, cites certain decisions of the Supreme Court of North Carolina in support of his contention that this and similar testimony is admissible; and it is probable that the learned judge who tried the case relied upon the North Carolina practice in that respect. In that state, the rule appears to be established that when a witness has given evidence and his credibility is impugned, whether by proof of general bad character, contradictory statements, or by cross-examination tending to impeach his veracity or memory, or at times by his very position in reference to the cause and the parties, 'in whatever way the credit of the witness may be impeached,' evidence of his previous statements is admissible in corroboration. Nor does it signify whether the previous statements are near or more remote from the occurrence, nor *ante litem motem,* or pending the controversy. In other words, it appears that in that state, the restrictions and conditions attaching to the admissibility of such evidence, as laid down in other jurisdictions by great weight of authority, do not obtain. *State* v. *Pace,* 159 N. C. 462, 74 S. E. 1018; *State* v. *Neville,* 157 N. C. 591, 72 S. E. 798; *Chrisco* v. *Yow,* 153 N. C. 434, 69 S. E. 422; *Cuthbertson* v. *Austin,* 152 N. C. 336, 67 S. E. 749; *Matthews* v. *Metropolitan Ins.*

Co., 147 N. C. 339, 61 S. E. 192, 18 L. R. A. (N. S.) 1219; *State* v. *Exum*, 138 N. C. 599, 50 S. E. 283" (Pages 425, 426).

From this excerpt it is quite apparent that the trial court, in admitting this evidence, was following the common law as it existed in the State of North Carolina, and presumably as it existed there in 1789. Did the Circuit Court of Appeals follow the North Carolina Rule of 1789? It did not, but said:

> "We do not think that the federal courts in a criminal case should be bound by or follow these decisions. With great deference to the views of that (North Carolina) court, we think the admission of such evidence, practically without restriction or limitation, is fundamentally unsound, and destructive of the most vital rights of one accused of crime" (Page 426).

In other words, this very appellant has been confronted with this situation, to wit, that when a rule of evidence, admittedly the common law rule of the state in which the federal court was sitting, appeals to the federal court as "fundamentally unsound, and destructive of the most vital rights of one accused of crime," then the federal court will not follow the rule, unless it be the archaic one that prevents one spouse from testifying for the other.

The study of the cases on this subject which we have made during the course of the various trials of this case has caused us to attempt to find an answer to the puzzling problem of why the federal courts have seemed so reluctant to relax the rule of 1789 with reference to a husband and wife, and yet so ready to relax it in other cases such as those to which we have directed the Court's attention.

We believe the answer is found in a certain peculiar cast of the judicial and legal mind with reference to the matter of confidential communications. The lawyer, from the be-

ginning of his training as such, is taught to hold as sacred all communications of a confidential nature. It is ingrained into his very nature, throughout his years as a student and as a practitioner; it becomes almost second nature with him.

Of course the common law rules, which have been very rarely modified by statute, still hold inviolate communications by husband to wife, or vice versa, and will not permit one spouse to reveal such communications upon the witness stand, or to testify to matters which came to their knowledge because of and during the marriage relationship. Of course this reason is entirely different from the one which prevented one spouse from testifying for another. The old common law reason for such a rule was presumably self-interest. But it is not inconceivable to us that subconsciously, perhaps, the legal mind has confused the two propositions, and there has been an inherent indisposition to relax the rule in the latter case because of a fear that it might affect the rule in the former.

We insist that this Court may now hold that the Judiciary Act of 1789 did, in fact, establish the rules of evidence as of that time as the rules of evidence in the Federal Courts, but that that Act also intended to confer upon the Federal Courts the power to modify those rules and to adapt them to changing conditions. We insist that such a holding does not do violence to the decision in the *Reid* case, or to any other decision of this Court; and moreover, it is certainly supported by the holding of this Court in the *Rosen* case, *supra*, and in the case of *Greer* v. *United States* (Jan. 28, 1918), 245 U. S. 559, 62 L. Ed. 469, 38 S. C. R. 209.

Proposition No. 3.—Convinced as we are of the logical correctness of our Proposition No. 1, we frankly admit our doubt of the willingness of this Court to follow us, in the light of the decided cases. We are firmly of the opinion that our Proposition No. 2 can be accepted by this Court

without running contrary to the doctrine of *stare decisis*. However, in the event that we are wrong in this respect, we insist that, under the accepted principles of that doctrine, this Court should hold that Congress itself has by statute manifested a purpose to remove the common law disqualification of the wife as a witness for her husband. We cite as authority for this proposition the *Reid* case, *supra;* the case of *Benson* v. *United States* (Dec. 5, 1892), 146 U. S. 325, 36 L. Ed. 991, 13 S. C. R. 60; and the *Rosen* case, *supra.*

In the *Reid* case, just before announcing its conclusion that "the rules of evidence in criminal cases are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed" (Page 366), the court had sought to determine just what rule Congress did have in mind to be applied in the federal courts. It finally concluded as follows:

> "* * * And the only known rule upon the subject which can be supposed to have been in the minds of the men who framed these Acts of Congress was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts" (Page 365).

And then the court adds this striking and significant language:

> "And this view of the subject is confirmed by the provisions of the Act of 1789, which refers its courts and officers to the laws of the respective states for the qualifications of jurors, and the mode of selecting them. And as the courts of the United States were in these respects to be governed by the laws of the several states, it would seem necessarily to follow that the same principles were to prevail throughout the trial; and that they were to be governed in like manner, in

> the ulterior proceedings after the jury was sworn, where there was no law of Congress to the contrary'' (Pages 365-366).

Here is a holding to the effect that, because Congress referred its courts to the laws of the respective states for the determination of the qualifications of jurors and the mode of selecting jurors, therefore the court must assume that Congress intended those courts to follow the same principles throughout the trial, and particularly as to rules of evidence.

In the *Benson* case, which we have discussed at some length in the brief in support of the petition, the court held that a codefendant, not on trial, was a competent witness for the government against the defendant on trial. It indeed recognized the harsh and strict rule of the old common law in the following language:

> ''Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors'' (Page 336).

It then points out the modern trend of the courts with respect to the matter of competency of witnesses, as follows:

> ''But the last fifty years have wrought a great change in these respects, and today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction'' (Page 336).

And it then directs particular attention to two Acts of Congress, as follows:

> "By Congress, in July, 1864 (Rev. Stat. 858), it was enacted that 'in the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried,' with a proviso as to actions by and against executors, etc. And on March 16, 1878, it also passed an Act permitting the defendant in criminal cases to testify at his own request. 20 Stat. at L. 30" (Page 336).

After citing these statutes, the court then says:

> "In the light of these authorities and this legislation of Congress, there is less difficulty in disposing of this question. If interest and being a party to the record do not exclude a defendant on trial from the witness stand, upon what reasoning can a codefendant, not on trial, be adjudged incompetent?" (Page 337).

In other words, one of the principal reasons that the court assigns for its holding to the effect that this particulary codefendant was competent, is the Act of Congress of March 16, 1878, 20 Stat. at L. 30, Title 28 U. S. C. A. Par. 632, which permits a defendant in criminal cases to testify at his own request. The opinion proceeds upon the theory that the reason for the exclusion of the codefendant as a witness was based upon his interest in the outcome of the trial, and that if the interest of the defendant shall not act to exclude him, then certainly a codefendant should not be excluded.

In the *Rosen* case *supra,* the court held that the common law rule of 1789 should no longer act to exclude as a witness a person convicted of infamous crime. In reaching this conclusion, there was much discussion of the *Benson* case, and of the modern trend and disposition of courts and of

legislative bodies to remove disabilities from witnesses "under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in the case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent." The court then says:

> "Since the decision in the *Benson* case we have significant evidence of the trend of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury (Rev. Stat. 5392, Comp. Stat. 1916, 10,295) by the enactment of the Federal Criminal Code in 1909 (35 Stat. at L. 1088, chap. 321; Comp. Stat. 1916, 10,165) with this provision omitted and 5392 repealed. This is significant, because the disability to testify, of persons convicted of perjury, survived in some jurisdictions much longer than many of the other common-law disabilities, for the reason that the offense concerns directly the giving of testimony in a court of justice, and conviction of it was accepted as showing a greater disregard for the truth than it was thought should be implied from a conviction of other crime" (Page 471).

Immediately after this excerpt, the conclusion is announced that destroys the common law rule of 1789 as applied to convicts.

This conclusion is based, certainly in part, and as we see it, in great part, upon the Act of Congress referred to, which removes the disability of witnesses convicted of perjury. In other words, this court felt warranted in holding that when Congress removed the disability of a convicted perjurer, it intended to remove the disability of all persons convicted of any infamous offense.

Now what is the logical conclusion from these three decisions? We summarize them:

(1) Congress referred its courts to the local laws in the matter of competency of jurors and mode of selecting them. Therefore, Congress intended that these same courts should look to these same local laws in all matters of procedure during the course of the trial, including the laws of evidence.

(2) Congress made a defendant in a criminal case competent as a witness at his own request. Therefore, Congress intended that a codefendant should be permitted to testify against the defendant on trial, because if the interest of the defendant did not prevent his taking the stand, the interest of the codefendant should not.

(3) Congress provided that conviction of perjury should not disqualify as a witness in the federal courts. Therefore, Congress must have intended that no conviction of any crime, however infamous, should act to exclude such a convict from testifying.

So far as we are advised, these decisions have not been subsequently criticized. Certainly they have not been criticized, modified, or overruled with reference to any of the matters to which we have referred. If they be sound, then we submit that by a much stronger reason, when Congress, by legislation, provided that a defendant might testify in his own behalf at his request, there remained no reason whatsoever for the exclusion of the defendant's wife in his behalf.

Remember that in the *Jin Fuey Moy* case this court said:

> "The rule that excludes a wife from testifying for her husband is based *upon her interest in the event*, and applies irrespective of the kind of testimony which she might give" (Page 195).

Now comes the legislative branch of the government and says that the most interested party in the outcome of a trial, to wit, the defendant, may testify if he so desires. The

only reason for excluding him was his interest in the event. Under the same reasoning that was controlling in the *Reid* case, the *Benson* case, and the *Rosen* case, just referred to and quoted from, Congress must have intended, by such action, to make the wife of the defendant competent, at the same time that it made the defendant competent.

It seems to us that to hold otherwise, must, of necessity, weaken the strength and effectiveness of the *Reid* case, the *Benson* case, and the *Rosen* case, as authority; and it must be remembered that if the authority of the Reid case, particularly, is destroyed, then one has swept away the entire foundation for the rule for which the government must contend in order to sustain the decision of the lower courts.

Therefore, we very earnestly and seriously contend that in any event, whether this case be decided upon the principles of logic and reason, or whether the Court determines to adhere rigidly and steadfastly to the doctrine of *stare decisis;* upon any construction of the Act of 1789, and upon any theory of the origin and evolution of the rules of evidence in the federal courts, it must be held that the wife of the appellant in this case was a competent witness in his behalf, and that reversible error was committed when she was not permitted to testify at his instance.

Conclusion.

It is therefore respectfully submitted that this Court should reverse the decision of the District Court for the Middle District of North Carolina and the Circuit Court of Appeals for the Fourth Circuit.

CHAS. A. HAMMER,
ALLEN ADAMS,
JOHN W. CARTER, JR.,
Counsel for Appellant.